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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-92

ABRAHAM COHEN and ESTHER FRIEDLANDER,
as Co-Executors of the Last Will of
Raphael Cohen, Deceased,
Petitioners,

against

FRANCHARD CORPORATION, LOUIS A. SIEGEL
and SEYMOUR YOUNG,
Respondents,

and

JOSEPH E. LOW, GLICKMAN CORPORATION OF NEVADA,
and WEDGWOOD HOUSE ASSOCIATES,
Defendants.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' JOINT BRIEF IN OPPOSITION

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RESPONDENTS' JOINT BRIEF IN OPPOSITION

Franchard Corporation, Louis A. Siegel and Seymour Young submit this Joint Brief in Opposition to the petition of Abraham Cohen and Esther Friedlander for a writ of certiorari to the United States Court of Appeals for the

Second Circuit seeking review of the unanimous judgment of that Court which affirmed* the judgment entered following a unanimous jury verdict in the United States District Court for the Southern District of New York (MacMahon, J.).

Questions Presented

The petition proposes four questions for review by this Court which are alleged to involve "important substantive and procedural questions of broad and national impact" (Petition at 4). Respondents submit that on the facts of this case neither substantive nor procedural questions are presented which warrant review by this Court. The questions petitioners propose for review are based upon assumptions of facts unsupported by the record. The only questions which might properly be raised in this case do not merit review. Those questions are:

1. Is there in fact any conflict in the decisions of the courts of appeals as to the necessity for proving *scienter* in a private action for damages alleging violations of Section 10(b) of the Securities Exchange Act of 1934 and of Rule 10b-5 promulgated thereunder?

2. May petitioners, who alleged in their complaint and offered evidence at trial of actual reliance upon an allegedly false and fraudulent prospectus, and who expressly consented, and failed to except, to a charge which adopted that theory, obtain review by now contending that actual reliance need not be alleged or proven?

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* Circuit Judge Timbers authored the opinion (Appendix A at 1a-20a of the Petition) for the panel which included Chief Judge Friendly and Circuit Judge Oakes.

3. In the absence of an exception to a jury charge, may a court of appeals decline to invoke the "plain error" rule when it finds that no substantial miscarriage of justice has occurred?

Statutes and Rules Involved

The only statutes and rules involved in this proceeding are Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j (b) (1971), Rule 10b-5 promulgated thereunder by the Securities and Exchange Commission, 17 C.F.R. § 240.10b-5 (1973), and Rule 51, Federal Rules of Civil Procedure.*

The Facts

The Second Circuit, in its opinion (Petition, Appendix A at 2a-10a), set forth a detailed review of the facts adduced at trial. Not only does petitioners' purported statement of the facts (Petition at 5-13) bear little, if any, resemblance to the facts recited by the court below, but it contains statements which are totally unsupported by the record.

Thus, for example, while petitioners assert (Petition at 6) that "[t]he Securities Exchange Commission [sic] subsequently criticized the Glickman brochures for, *inter alia*, their failure to outline to the public the grave risks of each of the syndication offerings [citation omitted]", the true fact is that the brochures and prospectuses involved in this case were not involved in the proceeding before the Securities and Exchange Commission to which petitioners refer.

* Petitioners by failing to raise on their appeal below any portion of the jury charge relating to their claims under N. Y. General Business Law § 352 (McKinney 1968) and by failing to appeal any aspect of the trial relating to that section have waived any claims of error in this case in respect of that statutory provision.

Similarly, petitioners erroneously assert that investors in the real estate syndication—a limited partnership known as Wedgwood House Associates—"were promised that they would receive an 11% per annum return on the investment . . ." (Petition at 8 and 9), whereas the proof at trial and the opinion of Second Circuit reveal that such return was clearly presented as an "anticipated" one and was not "promised." (Petition, Appendix A at 6a).

Petitioners also mistakenly assert that the prospectus was "aimed at the elderly, retired and generally unsophisticated investor with small resources". (Petition at 2). Not only is that assertion unsupported by the record, but the record actually shows that Raphael Cohen, the original named plaintiff, was a highly experienced real estate investor who purchased some of his limited partnership interests after all of the facts complained of in his complaint were matters of public knowledge.

Other groundless assertions by petitioners are (a) that "[p]etitioners produced proof of the fraud" (Petition at 3); (b) that "respondents conceded that they had conducted no investigation into the representations contained in the Prospectus and had not disclosed to the public their non-investigation" (Petition at 3); and (c) that "one area of fraud remained undisputed. There was no financial stability in the syndication." (Petition at 11).

To the contrary, the trial record shows that petitioners failed to produce proof of any actionable conduct, let alone acts of fraud, by any of the respondents or defendants. Moreover, the admitted architect of the real estate syndication, Louis J. Glickman, one of the three general partners of Wedgwood House Associates, who was necessarily privy to all of the matters complained of by petitioners, was not even named by them as a defendant—a fact brought to the jury's attention but never explained by petitioners. Indeed, Glickman, called as a principal witness by petitioners, testi-

fied without contradiction not only that no misrepresentations, misstatements or omissions had ever occurred and therefore no fraud had been committed, but also that there was no basis for having involved any of the respondents in this lawsuit.

Glickman's uncontradicted testimony was confirmed by the equally uncontradicted testimony of respondents Siegel and Young*, the other two of the three general partners of Wedgwood House Associates. They, too, were called as witnesses by petitioners and testified as to their knowledge and disclosure of all relevant and material facts pertaining to the syndication and the disclosure of those facts in the prospectus. While respondents Siegel and Young candidly testified that they had not seen any financial statement of Glickman or of Venada** prior to the organization of the limited partnership, Wedgwood House Associates, they did testify that they knew that Glickman was a multi-millionaire and that Venada was Glickman's wholly owned company. Moreover, Siegel testified that at the time of the syndication offering to the public, respondent Franchard Corporation was in registration for a public offering of its stock and that the certified public accountants did not report any facts in connection therewith which could have raised any suspicion whatsoever that either Glickman or Venada had any financial problems.***

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* Notwithstanding petitioners' assertions that "Siegel and Young had a substantial self-interest (undisclosed to the public) in not investigating" (Petition at 10), both the prospectus and the agreement of limited partnership, signed by each purchaser, clearly disclosed the affiliation of respondents Siegel and Young with respondent Franchard Corporation and with other affiliated companies.

** Venada, the net tenant of the real properties which were syndicated, was named as a defendant and served with process, but did not appear. The action against Venada was dismissed on consent.

*** The public offering of respondent Franchard Corporation (known in October 1960 as Glickman Corporation) involved in part an exchange offer of previously issued limited partnership interests in other real estate syndications for stock in the new public corporation. Venada was the net lessee of two of the properties involved in the exchange offer.

Glickman also testified without contradiction that at the time of the offering of units in the limited partnership he had a combined wealth both personally and in Venada of more than $5,000,000; that prior to May, 1962, when Franchard Corporation stock was selling for approximately $15 to $18 a share, the stock he controlled was worth between $15,000,000 and $18,000,000; and that is was not until May 1962, long after the offering had been completed, that a substantial drop in the stock market caused erosion of his and Venada's financial position.

The trial record also clearly establishes the efforts respondents Siegel and Young successfully made to keep the real estate syndication viable in the face of the unforseeable adverse circumstances which developed. The documents which petitioners offered and which were received in evidence set forth all of the facts involving the limited partnership's difficulties growing out of the default of the net tenant Venada—documents which clearly demonstrated the lengths to which Siegel and Young went to protect the interests of the limited partners of Wedgwood House Associates.

As to the financial stability of the syndication, the record reveals that distributions made to the limited partners between 1961 and 1968, when the property was sold, totalled $7,418,336, equivalent to $5,500 per unit of limited partnership interest and $500 more than the cost of a unit. (Petition, Appendix A at 8a and fn. 5).

The documentary and testimonial record which the jury had before it thus showed that the claims of fraud on the part of respondents were made of whole cloth.

To catalog additional erroneous assertions of fact contained in the petition would prolong this brief unduly. The conclusion is inescapable that petitioners have attempted

to suggest facts in the apparent hope of having this Court believe that this case involves important considerations of substantive and procedural law.*

The Conduct of the Trial and the Subsequent Appeal

This action was tried before a jury in accordance with petitioners' choice. As appears from the decision below, the trial judge convened a conference of counsel for all parties to rule on their respective requests to charge. (Petition, Appendix A at 10a-12a). During that conference, petitioners' counsel accepted, among other things, the trial judge's suggestion that he charge the jury on the issue of reliance employing the language which appeared in the complaint. The colloquy between the trial judge and petitioners' trial counsel is brief but illuminating:

> "The Court: What about the rest of the elements [of a Section 10(b) action] except for damages?
>
> "Mr. Rogge: I have this question: Can you rely on an omission?
>
> "The Court: Well, you say in your complaint that without knowledge of the true facts and in reliance upon false and misleading statements that the plaintiffs and members of the class made the purchases hereinafter described.
>
> "Mr. Rogge: I will accept that, Judge."

Following the conclusion of the charge to the jury the trial judge requested exceptions to the charge. Petitioners failed to note any exception to the charge as required by Rule 51, Federal Rules of Civil Procedure, except for three matters which the court below found had nothing to do with

* It is noteworthy that this action was not commenced until November, 1967, almost five years after all of the facts concerning Glickman and Venada had first become public knowledge. The Second Circuit characterized this case as an "uncomplicated appeal" involving "a lack of preparation in addition to visibly inept trial conduct on the part of plaintiffs' counsel." (Petition, Appendix A at 2a).

any of the issues raised on the appeal.* Despite the absence of an exception, the court below held that petitioners had sufficiently asserted their position on the issue of *scienter* to preserve that issue for appeal and further held that the charge on that issue was correct. With respect to the issue of reliance, the court below held that petitioners had failed to preserve for appeal their contention that the charge on that issue was erroneous, but proceeded nevertheless to determine that the "plain error" rule should not be invoked in the circumstances of this case because petitioners' "claims do not demonstrate that a substantial miscarriage of justice has occurred." (Petition, Appendix A at 18a).

ARGUMENT

Despite petitioners' assertions to the contrary, the instant petition does not raise issues which warrant or merit further appellate review. The petition seeks merely to provide petitioners with still another opportunity to complain of an eminently sound jury verdict though the issues sought to be raised have no significance for anyone but petitioners who were unable to prove any part of their case at trial.

Not only are the facts presented by this case highly individualized, but as will hereinafter appear, the grounds upon which the petition are based do not present any "special and important reasons" which would justify further review of the questions decided below. The alleged conflict between the courts of appeals on the issue of *scienter* in a Section 10(b) case is illusory and the claimed conflict is, in fact,

* As was noted in the decision:

> "The three matters to which appellants' counsel excepted were: (1) a date used by the court in its recitation of the facts which counsel claimed was incorrect; (2) the court's reference to named plaintiff Cohen's purchase in 1964 of an additional unit of limited partnership interest in Associates; and (3) whether the charge sufficiently stated that individual purchasers had signed documents claiming that they had relied on the brochure." (Petition, Appendix A, fn. 10, at 12a-13a).

non-existent. We shall also demonstrate that the court below properly declined to invoke the "plain error" rule.

Reasons for Denying the Writ

I

The holding of the Second Circuit, sustaining the district court's charge on the issue of *scienter*, is consistent with the law applied in other circuits.

Petitioners claim that a conflict exists in the courts of appeals over whether proof of *scienter* is required in a private civil suit under Section 10(b) and Rule 10b-5. We submit that petitioners' contention is fallacious and that the decisions relied on belie the existence of such a conflict.

In unanimously affirming the jury verdict, the court below found no error in the charge as it related to the requirement of proof of *scienter*. As the court stated:

> "We uniformly have held that a party cannot be held liable in a private suit for damages under Rule 10b-5 for mere negligent conduct. . . . Although it is unnecessary to prove the specific fraudulent intent essential to a claim of common law fraud, it must be established that the defendant was to some extent cognizant of the misstatement or omission. . . . The standard for determining liability under Rule 10b-5 essentially is whether plaintiff has established that defendant either knew the material facts that were misstated or omitted and should have realized their significance, or failed or refused to ascertain and disclose such facts when they were readily available to him and he had reasonable grounds to believe that they existed. . . . It is not enough for plaintiff to show that defendant failed to detect certain material facts when he had no reason to suspect their existence." (Petition, Appendix at 16a (citations and footnote omitted)).

Petitioners contend that this "result is in conflict with other Circuits which have sustained 10(b) liability for negligence or lack of diligence." (Petition at 13). This assertion is simply incorrect. Despite certain dicta found in the opinions of the Tenth, Ninth, Eighth and Seventh Circuits that negligence is sufficient to sustain liability under Rule 10b-5, no decision has actually sustained liability in a private action for damages for mere negligence; damage awards to private plaintiffs have been confined to cases where either intent to defraud or knowing or reckless conduct was the basis of liability.

Consistent with actual holdings in other circuits and the statute from which Rule 10b-5 derives, the Second Circuit has made plain that "negligence" alone is not a proper standard of liability and does not provide a substitute for proof of *scienter* in private actions brought under Section 10(b) or Rule 10b-5. In *Lanza, et al.* v. *Drexel & Co., et al.*, Current CCH Fed. Sec. L. Rep. ¶ 93,959 (2d Cir. April 26, 1973), the court, sitting *en banc*, noted that to interpret Rule 10b-5 to encompass negligent conduct may exceed the rule-making power granted to the SEC, because Section 10(b) "authorizes rules making it unlawful '[t]o use or employ . . . any *manipulative or deceptive* device or contrivance . . .' (emphasis added)". The court quoted with approval from Bucklo, *Scienter and Rule 10b-5*, 67 Nw. U.L. Rev. 562, 590 (1972):

> "[T]he appellate courts have not yet imposed liability for mere negligence in private actions under rule 10b-5. Language embracing a negligence standard, or a standard less stringent than one of actual knowledge or reckless disregard for the truth, has in every instance been used in cases where the defendant's conduct was clearly violative of a higher standard, in cases arising on a motion to dismiss or in cases in which the court found [an] alternative rea-

> son to find no liability. In those few cases where the defendant's conduct might be said to constitute negligent behavior, but not knowing or reckless behavior, no liability has been found. (footnotes omitted)." *Id.*

The *Lanza* court concluded:

> "In sum, we believe that proof of a willful or reckless disregard for the truth is necessary to establish liability under Rule 10b-5." *Id.* at 93,831-2.

The Second Circuit's position is thus clear. The question then is whether any other court of appeals has held to the contrary.

In his exhaustive dissent (the majority, having found intent to defraud, did not reach the issue of *scienter*) in *Kohn* v. *American Metal Climax, Inc.*, 458 F.2d 255 (3d Cir.), *cert. denied*, 409 U.S. 874 (1972), Circuit Judge Adams analyzed a great number of Rule 10b-5 cases dealing with *scienter*, including most of the cases cited by petitioners,* and reached the following conclusion:

> "Close examination of the cases discussing fraud reveals that the courts which on the surface appear to have drifted away from the intent of Congress, as explicitly expressed in the legislative and adminis-

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* For the analysis referred to, *see, Kohn* v. *American Metal Climax, Inc., supra*, at 279-288, as follows:

(1) *Stevens* v. *Vowell*, at 283.
(2) *Royal Air Properties, Inc.* v. *Smith*, at 282-283.
(3) *Matheson* v. *Armbrust*, at 282.
(4) *Ellis* v. *Carter*, at 282.
(5) *Kohler* v. *Kohler*, at 283.

The decision in *Kohn* was rendered after the decision in *Gould* v. *American Hawaiian Steamship Company*, 319 F. Supp. 795 (D. Del. 1970), also cited by petitioners. Even if *Gould* stood for the proposition for which it is cited, and we submit it does not, it would not create the conflict for which petitioners contend.

> trative history of the Act and Regulations, have not demonstrated sufficient justification of their language. Scrutiny of the facts in the cases demonstrates that the culpability contemplated by the Act was indeed present, frequently in flagrant form.
>
> • • • • •
>
> "The first factor which becomes apparent [upon review of the cases] is that in every case where liability was found, conduct tantamount to actual fraud existed, despite the fact that the reviewing court may have used language broader than necessary. In no case was liability affixed to non-culpable conduct, regardless of the dicta." *Id.* at 286.

Accord, Comment, *Scienter and Rule 10b-5,* 69 Colum. L. Rev. 1057, 1080-81 (1969).

The remaining cases cited by petitioners in support of the claimed conflict do not, upon analysis, support their position. Rather, they are completely consistent with Circuit Judge Adams' analysis* and with the position enunciated by the Second Circuit.

Apart from petitioners' reliance upon an erroneous construction of the various decisions cited by them, they also point to the fact that a petition for a writ of certiorari to the Fifth Circuit was recently filed in *H. Hentz & Co.* v. *Kasner, petition for cert. filed,* 41 U.S.L.W. 3617 (U.S. May 22, 1973) (No. 72-1533). It is upon such a completely tenuous basis that the petitioners contend that "different interpretations of 10(b) and the standards of liability are the subject of recurring consideration." (Petition at 14). In *Hentz,* however, the district court had granted the defend-

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* *See* Bucklo, *supra,* for analysis of *City National Bank of Fort Smith, Arkansas* v. *Vanderboom,* 422 F.2d 221 (8th Cir.), *cert. denied,* 399 U.S. 905 (1970), *Gilbert* v. *Nixon,* 429 F.2d 348 (10th Cir. 1970) and *Mitchell* v. *Texas Gulf Sulphur Co.,* 446 F.2d 90 (10th Cir.), *cert. denied,* 404 U.S. 1004 (1971).

ants' motion for a directed verdict, and the Fifth Circuit reversed and remanded for a new trial, holding that there were sufficient contested facts to require the case to be submitted to the jury. We find nothing in the Fifth Circuit opinion to suggest that *scienter*, as it relates to an action under Section 10(b) or Rule 10b-5, was in issue.

Petitioners next mistakenly suggest that contrary to this Court's decisions in *Securities and Exchange Commission* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180 (1963) and in *Superintendent of Insurance of New York* v. *Bankers Life & Casualty Co.*, 404 U.S. 6 (1971), the court below has enunciated a rule which bodes ill for the enforcement of the securities laws and for the requirement of full disclosure in connection with the issuance of securities. (Petition at 14-15).

In our view the decision of the court below rests on a careful analysis of the record developed at the trial. Based upon the record in this case, respondents submit that even if a standard of "mere negligence" for which petitioners contend were deemed to be controlling, petitioners would nevertheless have failed in their burden of proving the existence of such "mere negligence". Thus, in no sense can this case present any overriding issue of importance to the administration of the securities laws.

We would note additionally that this Court has on three occasions decided cases interpreting Rule 10b-5 and in each instance has laid stress upon those aspects of that rule which are designed to prevent "fraud and deceit". Thus, in *Securities and Exchange Commission* v. *Capital Gains Research Bureau, Inc., supra*, and *Superintendent of Insurance of New York* v. *Bankers Life & Casualty Co., supra*, and in *Affiliated Ute Citizens of Utah* v. *United States*, 406 U.S. 128 (1972), the defendants in the respective cases were found to be active participants in the fraudulent activities alleged. The holdings in those cases, therefore, provide no support for the position asserted by petitioners.

Moreover, the legal principle which emerges from the decision below on the need for proof of *scienter* does not require actual knowledge of a misstatement or omission as petitioners suggest, but clearly encompasses a lesser requirement, i.e., "guilty knowledge" or a reckless disregard for the truth. As the court below pointed out, a defendant charged with a violation of Section 10(b) and of Rule 10b-5 may not be held liable upon a mere showing by a plaintiff that the defendant "failed to detect certain material facts when he had no reason to suspect their existence." (Petition, Appendix A at 16a.)

Based upon the foregoing, respondents submit that since no conflict exists on the issue of *scienter*, this case does not warrant further review.

II

The court below did not abuse its discretion by refusing to invoke the "plain error" rule on the issue of reliance.

Petitioners (Petition I, B at 17-18; and II at 19-20) challenge the decision below in two respects on the issue of reliance. The first question raised in this regard is whether petitioners were forced to prove actual reliance. The entire course and conduct of the trial reveal that in fact petitioners undertook that burden voluntarily based upon the allegations in their complaint and by offering proof through their investor witnesses that each had relied upon the offering documents. The second question raised is whether the court below properly concluded that the "plain error" rule should not be invoked in the circumstances of this case; we shall show that it did.

Respondents submit that the only question which has any meaning here, and which must be answered in the negative, is whether the court below committed error by refusing, in

its descretion, to invoke the "plain error" rule. Petitioners wholly failed to register any exception to the charge on the issue of reliance (*see*, 7-8 *supra*) and, as appears from the opinion below, acquiesced, in a pre-charge conference with the trial judge, to that portion of the charge which adopted, virtually verbatim, the language of petitioners' complaint (Petition, Appendix A at 13a-14a).

In any event, despite petitioners' non-compliance with Rule 51, Federal Rules of Civil Procedure, the court below undertook to determine whether or not a "substantial miscarriage of justice" had occurred.

The language of Rule 51 is clear and the salutary purpose of that rule has long been recognized. As Professors Wright and Miller point out:

> "Most of the circuits have said, by way of dicta, that the appellate court may reverse for plain error in an instruction that was not objected to, though these statements recognize that this is a power to be exercised only rarely, where necessary to prevent a miscarriage of justice. Actual reversals on the basis of plain error are rare. . . ." 9 Wright and Miller, *Federal Practice and Procedure*, § 2558 at 672 (1972).

Wright and Miller conclude (as quoted in the opinion below):

> "If there is to be a plain error exception to Rule 51 at all, it should be confined to the exceptional case where the error has seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 675.*

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* *Accord, United States* v. *Atkinson*, 297 U.S. 157, 160 (1936). Professor Moore takes a similarly narrow view of the "plain error" rule:

> "In the absence of objection thereto, the court's instructions to the jury are not reviewable, although the appellate court may in its discretion consider grounds of error in spite of a failure to object below where it is apparent on the face of the record that a miscarriage of justice may occur." 5A Moore, *Federal Practice*, ¶ 51.04 at 2507-2515 (1972).

This case does not fall within this narrow exception. Not only did petitioners' complaint allege actual reliance, but they tried their case on that basis.* Apart from the fact that petitioners did not submit a timely request to charge on the reliance issue, they agreed with the suggestion of the trial judge that the charge on the issue of reliance track the language of their complaint and they voiced no objection whatsoever to that portion of the charge.

Now petitioners belatedly and inconsistently argue that the district court erred despite the fact that they specifically requested the trial judge to repeat to the jury that the witnesses had signed documents stating that they had relied upon a selling brochure in purchasing their limited partnership interests. (Petition, Appendix A at 12a, fn. 10).

Petitioners have cited cases in support of their contentions that the decision below places the Second Circuit "at odds with other Circuit Courts which, under the same 'plan [sic] error' rule, have reviewed and reversed as to erroneous charges" (Petition at 19), and that its decision here is at variance with one of its own prior decisions. (*Id.*)

The cases cited disclose that under the "plain error" rule an appellate court, in its discretion, may review an error otherwise waived on trial only when it is apparent on the face of the record as a whole that a miscarriage of justice will result if it fails or refuses to review the claimed error.** The test clearly appears to be that the alleged error must be weighed against the entire trial record; thus, not every

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* Petitioners called various purchasers of the limited partnership interests to testify as to their reliance on the selling documents and upon Glickman's reputation and abilities.

** Review of the entire record presumably considered petitioners' case in other respects as well, including the quality of proof offered on other elements of their Rule 10b-5 claim.

error, nor every alleged error* relating to an important aspect of a case, requires reversal to relieve a party from his failure to comply with Rule 51, Federal Rules of Civil Procedure.

In a further attempt to buttress their claim under the "plain error" rule, petitioners assert that "[t]his Court has held that if the charge is erroneous, it is presumptively prejudicial" (Petition at 19), citing *McCandless* v. *United States*, 298 U.S. 342, 347-8 (1936) and *Fillippon* v. *Albion Vein Slate Company*, 250 U.S. 76, 82 (1919). The cases cited by petitioners do not stand for such a truncated proposition.

The circumstances presented in *Fillippon, supra,* and in *McCandless, supra,* clearly illustrate the depth of the resulting prejudice which must occur before the "plain error" rule should be invoked by a reviewing court. Nothing approaching the circumstances revealed by those cases occurred in the instant action. Petitioners' counsel was always present, tried the case upon a theory of actual reliance, consented to a charge which followed the language of petitioners' complaint and registered no exception to the charge as given. The court below was manifestly correct in refusing to invoke the "plain error" rule and in finding that petitioners' "claims do not demonstrate that a substantial miscarriage of justice has occurred." (Petition, Appendix A, at 18a).

Based upon the foregoing, respondents submit that this case does not warrant review by this Court in respect of the determination of the court below that the "plain error" rule should not be invoked in this case.

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* Petitioners misconstrue the Second Circuit's opinion by stating that the court below conceded that the "erroneous charge" related to important elements in petitioners' case. (Petition at 19.) In fact, the Second Circuit only suggested that it is "arguable" that the charge erred with respect to reliance. (Petition, Appendix A at 18a).

Conclusion

Respondents respectfully submit that there are no issues raised by the petition for a writ of certiorari in this case which would warrant review by this Court and therefore pray that the petition filed herein be denied.

Respectfully submitted,

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